No. 10-1011

Supreme Court, U.S.
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In The

Supreme Court of the United States

WINNEMUCCA COLONY COUNCIL,

Petitioner,

v.

SHARON WASSON and the
WINNEMUCCA INDIAN COLONY COUNCIL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT IN REPLY

The Winnemucca Colony Council ("WCC") has petitioned this Court for a writ of certiorari to review the Order of the Ninth Circuit Court of Appeals upholding the decision of the United States District Court of Nevada granting summary judgment to Respondents, Sharon Wasson and the Winnemucca Indian Colony Council (the "Wasson Group"). The decision of a specially agreed upon appellate panel (Pet. App. 174-179) referred to in these proceedings as the Minnesota Panel Decision was held to be binding, non-appealable order[1] in full force and effect, resulting in the funds from the Bank of America account being held in interpleader being disbursed to "the council recognized by the Minnesota Panel's August 16, 2002 order" [the Wasson Group]. In so doing, the interpled funds belonging to the Winnemucca Indian Colony were given to a non-existent council[2] and inferences have been made that those individuals are

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[1] As can be seen in the Agreement on Appellate Panel (Pet. App. 174-179), Respondents misled the District and Ninth Circuit Courts that the parties considered the Minnesota Panel binding and non-appealable. Pet. App. 5. There is no language in the Agreement that review by the specially appointed appellate panel would be binding and non-appealable. *See also* Resp. App. 8, wherein Respondents' counsel conceded that there was no exact language in the agreement that the parties would be bound.

[2] Only two (2) of the original five (5) individuals named as Council Members in that Order are still living or are members of the Tribe.

the legitimate Council Members of the Winnemucca Indian Colony.

Rather than addressing forthrightly the issues presented in the Petition, Respondents seek to disregard Appellant's History of Proceedings, strike portions of Appellant's Appendix because they are not part of the record, and disregard issues not presented or pressed upon when under review.

The History of Proceedings provided by Appellant was set forth to provide this Court with an overview of facts from the onset of the disputes between the tribal factions to give a better understanding of the case and issues involved. The facts are supported by Petitioner's Appendix. To strike portions of the History as suggested by Respondents will result in leaving out important procedural facts, facts that are relevant to these proceedings.

Respondents seek to strike certain portions of Appellant's Appendix because they were not included in the excerpts of record to the Ninth Circuit. In support of this, Respondent cites *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 454, 116 S.Ct. 221, 2232 (1996). The authority cited was found in *fn. 3* of Justice Scalia's dissenting opinion and the case involved issues pertaining to excessive jury awards. Respondent additionally cites *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1078 (9th Cir. 1988), wherein portions of excerpts were stricken because they were submitted in violation of that Court's rules. Respondent does not provide any authority to support

the proposition that portions of an appendix not part of the record below submitted with a Petition for Writ of Certiorari to the United States Supreme Court must be stricken.

Because of the significance of this case, Petitioner deemed it extremely important to provide this Court with pertinent information to provide a better understanding of what is involved. Petitioner's Appendix 8-24 was provided to support Petitioner's contention that the Ninth Circuit Court's decision was of importance to the Interior Board of Indian Appeals and the Bureau of Indian Affairs, as well as other entities, in addition to showing the BIA's refusal to recognize either faction as the legitimate government of Winnemucca Indian Colony. Petitioner's Appendix 185-188 was submitted to support Petitioner's contention that the ruling would be interpreted as identifying Respondents as the legitimate Tribal Council.

Petitioner's Appendix 47-71 consist of rulings by the Inter-Tribal Court of Nevada, the underlying case related to Respondents' Motion for Preliminary Injunction, USDC Case No. CV-N-04-0573. Respondents' Appendix 1-38 pertains to that case and is part of the record. Petitioner's Appendix 99-158 is the decision of Judge Steven Haberfeld and is referred to in Resp. App. 39-64. Petitioner's Appendix 159-171 is the Restraining Order issued by Tribal Court Judge Kyle Swanson at the onset of the controversies, and Pet. App. 174-179 is the Agreement on Appellate Panel, critical evidence supporting Petitioner's assertion that it did not enter into a binding and non-appealable agreement to submit the appeal to the

Minnesota Panel. These documents support the History of Proceedings provided by Petitioner and support contentions made by Petitioner in the Petition.

There is no question that a complete record was not provided to the Ninth Circuit during the appellate proceedings by either Petitioner's prior counsel or Respondents' counsel. Indeed, only several pages of the Minnesota Panel decision was provided to the Ninth Circuit. Petitioner's Appendix includes the Minnesota Panel decision in its entirety. Pet. App. 72-98.

Respondents further contend that issues not presented or pressed upon when under review should be disregarded. This court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed. *Duignan v. United States*, 274 U.S. 195, 200, 47 S.Ct. 566, 568, 71 L.Ed. 996 (1927) (citations omitted). This case is unique and any questions that may be considered not pressed or passed upon in the lower court are within the ambit of review under this exception.

Respondents go into great detail berating and blaming Petitioner for the years of prolonged litigation. As set forth in Petitioner's History of Proceedings, it was Acting Chairman William Bills (the "Bills Group" that evolved into WCC) who initiated action in the Tribal Court against the other members of the Winnemucca Colony Council in an effort to prevent the misuse and embezzlement of tribal funds. Pet.

App. 159-171. After the Restraining Order was issued by Tribal Court Judge Swanson, Respondents terminated the Tribal Court Judge. This action, as well as other disputes including issues pertaining to the fair and proper enrollment of tribal members, resulted in the split of factions and the commencement of actions by both groups. *See, e.g.*, Pet. App. 99-158, 174-179, 72-98, 61-71, 47-60; 8-24; Resp. App. 39-64, 1-38. Furthermore, after Magistrate Judge Valerie Cooke stayed the instant proceedings in an Order dated February 13, 2003 (Resp. Brf. 10, 63), Petitioner's motion for rehearing was brought before ITCAN (Pet. App. 61-71, 47-60). While the ITCAN panel of judges were well on the way to addressing enrollment issues which would have subsequently led to a valid election of a council by these members, Respondents brought suit for injunctive relief against ITCAN (Resp. Brf. 1-38), disrupting the proceedings.

Respondents are hypocritical in issuing all blame to Petitioner for the longevity of the proceedings and stating that Petitioner has failed to live up to the agreements that it entered into to resolve this matter (Resp. Brf. 7). The conduct of Respondents' counsel and Petitioner's prior counsel has been previously addressed. "The way in which this case had advanced procedurally has created disorder and confusion. The court finds that the facts regarding how the attorneys in this case have conducted themselves are disturbing." Resp. App. 43. *Citing* U.S. Magistrate Judge Valerie P. Cooke.

Respondents purport that the "[e]xhaustion of Tribal remedies and extending comity to a Tribal Court decision were the only two issues brought before the United States District Court." Resp. Brf. 14. This is not a true statement of the issue presented. The sole issue in this case is which parties are entitled to the Bank of America funds. Resp. App. 54. The determination of who has access to the money is dependent upon a resolution of which group constitutes the legal WIC tribal counsel. *Id.* In upholding the District Court's granting of summary judgment and extending comity to the Minnesota Panel's decision based on the misleading assertion by Respondents that the agreement was final and binding (*see fn. 1 supra*), the Ninth Circuit inferred that Respondents constitute the legitimate Tribal Counsel for the Winnemucca Indian Colony.

This case presents novel issues which are of great importance to Tribal Governments throughout the United States. This Court's decision will help refine the continuing trust relationship and responsibilities to all recognized tribal governments.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, the Petition for Certiorari should be granted.

Respectfully submitted,

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